UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Stephanie Harvey, Plaintiff, v. Saluda Smiles Family Dentistry, Carolina Dental Alliance, and VSM Management, LLC, Defendants.	Civil Action No. 8:14-cv-01966-JMC **ORDER AND OPINION**

Plaintiff Stephanie Harvey ("Harvey" or "Plaintiff") filed this action against Defendants Saluda Smiles Family Dentistry ("SSFD"), Carolina Dental Alliance ("CDA"), and VSM Management, LLC ("VML"), (collectively "Defendants") alleging that she was subjected to discrimination, retaliation, and a hostile work environment in violation of the Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e–2000e17. (ECF No. 1 at 4 ¶ 22–5 ¶ 27.) Plaintiff also alleged that she was discharged in violation of public policy and was defamed. (Id. at 6 ¶ 28–7 ¶ 38.)

This matter is before the court on Plaintiff's Motion for Reconsideration of the court's Orders entered on September 28, 2016 (ECF No. 53) (the "September Order"), and on December 28, 2016 (ECF No. 67) (the "December Order"), pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. (ECF No. 73.) Specifically, Plaintiff seeks reconsideration of the court's decision in both Orders to ultimately grant Defendants summary judgment on all of Plaintiff's claims. Defendants oppose Plaintiff's Motion for Reconsideration asserting that she has failed to offer an appropriate basis for granting the requested relief. (ECF No. 75.) For the reasons stated below, the court **GRANTS IN SMALL PART AND DENIES IN LARGE PART** Plaintiff's

Motion for Reconsideration.

I. BACKGROUND FACTS RELEVANT TO PENDING MOTION[1]

Plaintiff began working for the entity that became SSFD in 2005. (ECF No. 37-1 at 2:63:18–22.) In January 2012, CDA purchased SSFD and then sold it to VML in late December 2012.[2] (ECF Nos. 35-4 at 1 ¶ 2, 2 ¶ 4 & 35-5 at 2 ¶ 3.) When VML acquired the assets of SSFD, its employees became employees of VML. (ECF No. 35-3 at 2 ¶ 3.) SSFD had employed less than 10 employees at all times prior to the sale. (ECF Nos. 35-5 at 1 ¶ 2 & 35-4 at 1 ¶ 3.) Under VML's ownership, Operations Manager Jennifer Mitchell ("Mitchell") was responsible for SSFD's "day to day management of administrative issues and personnel disputes." (ECF No. 35-3 at 3 ¶ 9.) Mitchell reported directly to Mark Lakis ("Lakis"), VML's Chief Executive Officer. (ECF No. 35-4 at 2 ¶ 6.)

In July of 2012, CDA hired Dr. Seung Kyu Choi ("Dr. Choi") as the dentist for SSFD. (ECF No. 37-3 at 4:12:20–23.) Staff members of SSFD expressed their concerns about Dr. Choi to Office Manager Amanda Hayes ("Hayes") because Dr. Choi "was inexperienced, did not seem to know what he was doing, was unable to communicate effectively, and was making mistakes." (ECF No. 35-5 at 2 ¶ 7.) "Plaintiff alleges that she and Dr. Choi had a difficult working relationship." (ECF No. 53 at 2.) In or around late 2012 or early 2013, Plaintiff filed a complaint about Dr. Choi with the South Carolina Department of Labor, Licensing and Regulation ("LLR") regarding patient care concerns. (ECF No. 37-1 at 16:131:8–18:136:19.) Plaintiff asserts that only she and Hayes knew that Plaintiff was responsible for the LLR

[1] The December Order provided a thorough recitation of the relevant factual and procedural background of the matter. (See ECF No. 67 at 2–4.) For purposes of the pending Motion, the court does not find that this background was deficient and so it is repeated in full.

[2] CDA was "a name referring to a collective group of dental practices" but "each dental practice was its own separate business, and the staff at a particular location were employed by that business." (ECF No. 35-4 at 1 ¶ 3.) "For instance, the staff who worked at the Saluda practice were employed by Saluda Dental Group, LLC." (Id.)

complaint. (Id. at 18:136:6–19.) Hayes admits that she became aware "that the LLR was investigating Dr. Choi," but Hayes denies either knowing that Plaintiff was responsible for the LLR complaint or telling anyone that Plaintiff was said complainant. (ECF Nos. 35-5 at 4 ¶ 12 & 37-5 at 21:41:13–21.) Mitchell and Lakis deny that they were aware during Plaintiff's employment that she had made a complaint to the LLR. (See ECF Nos. 35-3 at 6 ¶ 19 & 35-4 at 5 ¶ 19.)

On or about April 18, 2013, Plaintiff alleges that she told Hayes that she had filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission ("EEOC"). Plaintiff admits that she asked Hayes to not tell anyone about the Charge and that Hayes was the only person that knew about it. (ECF No. 37-1 at 26:170:6–14 & 28:178:5–6.) Hayes denies that she was told about Plaintiff's Charge on April 18, 2013. (ECF No. 35-5 at 7 ¶ 24.) Thereafter, on April 24, 2013, Plaintiff signed the document purporting to be her Charge (and filed it sometime thereafter with the EEOC and the South Carolina Human Affairs Commission ("SCHAC")) asserting as follows:

> I have been subjected to harassment from July 20, 2012 through March 21, 2013, and continuing, by Dr. Seung Kyu Choi. Dr. Choi treats a similarly situated white employee more favorably.
>
> I, therefore, believe that I have been discriminated against on the basis of my race (black) in violation of the SC Human Affairs Law, as amended and Title VII of the Civil Rights Act of 1964, as amended.

(ECF No. 35-2 at 47.[3])

Plaintiff was terminated on April 25, 2013. (ECF No. 37-1 at 23:159:18–24:160:2.) At the time of her termination, VML was Plaintiff's employer. (ECF No. 35-5 at 2 ¶ 3.) Hayes, Lakis, and Mitchell all assert that they became aware of Plaintiff's Charge on or after May 8,

[3] The court observes that the copy of the Charge in the record does not contain a "filed" date stamp. (See ECF No. 35-2 at 47.)

2013, when Defendants received correspondence from the SCHAC. (ECF Nos. 35-5 at 6 ¶ 22, 35-3 at 6 ¶ 18 & 35-4 at 5 ¶ 18.) Additionally, Hayes asserts that until she received the correspondence from the SCHAC on May 8, 2013, she "never told anyone that . . . [Plaintiff] had complained of discrimination or that I thought . . . [Plaintiff] planned to file a complaint of discrimination." (ECF No. 35-5 at 7 ¶ 24.)

On May 16, 2014, Plaintiff filed an action in this court alleging race discrimination, hostile work environment, and retaliation claims pursuant to Title VII and pendent state law claims of public policy discharge and defamation. (ECF No. 1 at 4 ¶ 22–5 ¶ 27, 6 ¶ 28–7 ¶ 38.) On November 16, 2015, Defendants filed a Motion for Summary Judgment. (ECF No. 35.) Plaintiff filed a Memorandum in Opposition to the Motion for Summary Judgment on December 3, 2015. (ECF No. 36.) On March 30, 2016, the Magistrate Judge issued a Report and Recommendation recommending that Defendants' Motion for Summary Judgment be granted. (ECF No. 43 at 19.) After considering Plaintiff's Objections to the Report and Recommendation (ECF No. 44) and Defendants' Reply to Plaintiff's Objections (ECF No. 45), the court entered the September Order, which granted Defendants summary judgment on all of Plaintiff's claims except for the retaliation claim as to her termination. (ECF No. 53 at 19.)

On October 31, 2016, Defendants moved the court to reconsider the decision in the September Order to deny summary judgment as to retaliation pursuant to Rule 54(b).[4] (ECF No. 59.) Despite Plaintiff's opposition to the Motion for Reconsideration (ECF No. 61), the court granted the Motion. (ECF No. 67.) Thereafter, on January 25, 2017, Plaintiff filed the instant Motion for Reconsideration. (ECF No. 73.)

II. LEGAL STANDARD AND ANALYSIS

Plaintiff seeks reconsideration of the foregoing pursuant to Rule 59(e).

[4] The court observes that "rule" refers to the Federal Rules of Civil Procedure.

A. Applicable Standard under Rule 59(e)

Rule 59 allows a party to seek an alteration or amendment of a previous order of the court. Fed. R. Civ. P. 59(e). Under Rule 59(e), a court may "alter or amend the judgment if the movant shows either (1) an intervening change in the controlling law, (2) new evidence that was not available at trial, or (3) that there has been a clear error of law or a manifest injustice." Robinson v. Wix Filtration Corp., 599 F.3d 403, 407 (4th Cir. 2010); see also Collison v. Int'l Chem. Workers Union, 34 F.3d 233, 235 (4th Cir. 1994). It is the moving party's burden to establish one of these three grounds in order to obtain relief. Loren Data Corp. v. GXS, Inc., 501 F. App'x 275, 285 (4th Cir. 2012). The decision whether to reconsider an order under Rule 59(e) is within the sound discretion of the district court. Hughes v. Bedsole, 48 F.3d 1376, 1382 (4th Cir. 1995). A motion to reconsider should not be used as a "vehicle for rearguing the law, raising new arguments, or petitioning a court to change its mind." Lyles v. Reynolds, C/A No. 4:14-1063-TMC, 2016 WL 1427324, at *1 (D.S.C. Apr. 12, 2016) (citing Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5 (2008)).

B. The Parties' Arguments

Even though she generally seeks reconsideration of "the orders granting summary judgment as to all claims" (see ECF No. 73 at 1), Plaintiff specifically asserts that it would be an error of law or manifest injustice if the court fails to reverse its decision granting Defendants' Motion for Summary Judgment on her claims for Title VII retaliation and public policy discharge. (Id. at 2.) Regarding her retaliation claim, Plaintiff argues that the court erroneously concluded that SSFD and CDA were not her employer. (ECF No. 73 at 4.) Plaintiff further argues that the court erroneously determined in the December Order that she failed to exhaust her retaliation claim after making a finding in the September Order that she had exhausted it.

(ECF No. 73 at 4.) Plaintiff asserts this was error because she "was not required to file another charge of discrimination as it relates back." (id. (citing Nealon v. Stone, 958 F.2d 584, 590 (4th Cir. 1992)).) Moreover, Plaintiff asserts that her "termination happened during the pendency of the charge, is related to the allegations in the charge, and it was developed during the reasonable investigation of the charge." Id. (citing King v. Seaboard Coast Line R.R., 538 F.2d 581, 583 (4th Cir. 1976)). Finally, Plaintiff argues that the court discounted her evidence in granting summary judgment to Defendants on her retaliation claim. (Id. at 5.) Plaintiff asserts that there is a genuine dispute of material fact because "she told Hayes about complaining to the EEOC" and, therefore, it is reasonable to infer that Hayes "did tell Mitchell or Lakis and they are simply all denying knowledge." (Id. at 5–6.)

As to her claim for public policy discharge, Plaintiff requests that the court reassess its dismissal because her termination "is EXACTLY the type of situation that a public policy discharge claim is there to protect." (ECF No. 73 at 6.) Plaintiff contends that state statutory law concerning the South Carolina Board of Dentistry demonstrates that it is state public policy to protect individuals who complain to the Board. (Id. at 6–7 (citing S.C. Code Ann. § 40-15-180 (2016)).) In this regard, Plaintiff asserts that the court should "reconsider the dismissal of this [public policy discharge] claim or at least certify the question to the South Carolina Supreme Court since this is a matter of South Carolina State Law and would otherwise deprive the Plaintiff of her day in court." (Id. at 6.)

In Response to Plaintiff's Motion for Reconsideration, Defendants first reassert that the court was correct in finding that Plaintiff's evidence did not demonstrate either that SSFD was an employer under Title VII or that CDA was her employer. (ECF No. 75 at 2.) Defendants next assert that the court did not commit error in finding "that Nealon did not apply to this case

because the retaliation charge could not have 'grown out of' an event of which the decisionmakers had no knowledge." (Id. at 4 (citations omitted).) As to Plaintiff's argument regarding the sufficiency of her evidence in support of retaliation, Defendants argue that "'a party cannot defeat summary judgment by simply arguing that the opposing party is lying; instead, the party must offer admissible evidence that creates a genuine dispute of fact.'" (Id. at 4 (quoting ECF No. 59 at 7–12).) Finally, Defendants assert that the court should not entertain Plaintiff's request to certify a question because it is clear that her evidence fails to meet the criteria for demonstrating a public policy exception to at-will employment. (Id. at 5 (citing Taghivand v. Rite Aid Corp., 768 S.E.2d 385 (S.C. 2015)).)

C. The Court's Review

In her Motion, Plaintiff asserts she is entitled to reconsideration for the following reasons: (1) SSFD and CDA were her employers and should be included in the action as Defendants; (2) she exhausted her claim for retaliation; (3) there is a genuine dispute of material fact regarding her claim for retaliation precluding summary judgment; and (4) she has demonstrated a claim for public policy discharge that either should move forward to trial or should be certified to the South Carolina Supreme Court.[5] Plaintiff asserts that she is entitled to reconsideration on the basis that it would be a clear error of law or manifest injustice if the court failed to reverse its decision.[6]

[5] The court observes that initially in her Motion Plaintiff asks for reconsideration of "the orders granting summary judgment as to all claims." (See ECF No. 73 at 1.) Upon review, the court observes that Plaintiff did not provide any basis in her Motion to support reconsideration of summary judgment to Defendants on her claims for race discrimination, hostile work environment, and defamation. Accordingly, the court **DENIES** the Motion for Reconsideration as to these claims.

[6] Clear error occurs when the reviewing court "is left with the definite and firm conviction that a mistake has been committed." United States v. Harvey, 532 F.3d 326, 336 (4th Cir. 2008) (internal quotation marks omitted); see also United States v. Martinez–Melgar, 591 F.3d 733, 738 (4th Cir. 2010) ("[C]lear error occurs when a district court's factual findings are against the

1. Employer Status of SSFD and CDA

In her Motion, Plaintiff argues that "[b]oth SSFD and CDA should be included as Defendants," but does not provide any support for that argument. In the December Order, the court specified the law and evidence supporting the finding that (1) SSFD failed to satisfy the elements of the definition of an employer under Title VII and (2) CDA was not Plaintiff's employer at any relevant time. (ECF No. 67 at 8–9.) Accordingly, the court declines to reconsider this finding and, therefore, **DENIES** Plaintiff's Motion for Reconsideration regarding the status of SSFD and CDA as Defendants.

2. Exhaustion of the Retaliation Claim and a Prima Facie Case

Plaintiff moves for reconsideration asserting that she has both exhausted her administrative remedies and demonstrated a prima facie case of Title VII retaliation. (ECF No. 73 at 4–5.)

In determining whether Plaintiff exhausted her administrative remedies, the court is required to consider the scope of the administrative investigation that can reasonably be expected to follow from the discriminatory acts alleged in the administrative charge. Logsdon v. Turbines, Inc., 399 F. App'x 376, 379 (10th Cir. 2010). In this regard, "a plaintiff may raise the retaliation claim for the first time in federal court" and "that rule is the inevitable corollary of our 'generally accepted principle that the scope of a Title VII lawsuit may extend to 'any kind of discrimination like or related to allegations contained in the charge and growing out of such

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clear weight of the evidence considered as a whole.") (internal quotation marks omitted); Miller v. Mercy Hosp., Inc., 720 F.2d 356, 361 n.5 (4th Cir. 1983) (explaining that a district court's factual finding is clearly erroneous if "the finding is against the great preponderance of the evidence") (internal quotation marks omitted). Manifest injustice occurs where the court "has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension . . . ." Campero USA Corp. v. ADS Foodservice, LLC, 916 F. Supp. 2d 1284, 1292–93 (S.D. Fla. 2012) (citations omitted).

allegations during the pendency of the case before the Commission.'" Nealon, 958 F.2d at 590 (citations omitted). However, if a retaliation count in a Title VII lawsuit is not "related to" and "growing out" of the EEO charge, Nealon's relation back rule "cannot operate to overcome a plaintiff's failure to have exhausted administrative remedies." Brown v. Runyon, No. 96-2230, 1998 WL 85414, at *3 (4th Cir. Feb. 27, 1998).

In the December Order, the court found Nealon inapplicable because it was not clear how Plaintiff's "alleged retaliatory termination would have followed a reasonable investigation of her Charge alleging harassment by Dr. Choi." (ECF No. 67 at 11.) Upon reconsideration, the court concludes that an investigation into Plaintiff's termination claims would have reasonably "grown out" of SCHAC's investigation into the allegations of her Charge. To reach this conclusion, the court observes that Defendants in their Position Statement expressly inform SCHAC about Plaintiff's termination and how it is "related to" her interactions with Dr. Choi, the alleged harasser identified in the Charge (see ECF No. 35-2 at 4). (ECF No. 37-7 at 3.[7]) Therefore, after considering the parties' arguments on reconsideration, the court finds that it did commit clear

[7] Defendants' Position Statement stated as follows:

> Ms. Stephanie Harvey has had consistent issues regarding her extremely poor attitude, insubordination, disrespectfulness and performance. Chronological summaries to support these infractions, her work history, management history and a telephone interview are listed below with corresponding Exhibits attached. We believe that Ms. Harvey is a disgruntled former employee specifically attempting to hurt the reputation of Dr. Seung Kyu Choi. Ms. Harvey worked directly as Dr. Choi's dental assistant on operative dental procedures and repeatedly acted in an unprofessional, rude and condescending manner toward Dr. Choi. She did not support or accept direction from Dr. Choi to improve her performance, despite that fact that she is his assistant. On many occasions she directly questioned Dr. Choi's clinical skills and decisions, which she is undoubtedly unqualified to do. Ms. Harvey's attitude created a negative atmosphere in a very small office, which continually got worse. On April 24, 2013 Ms. Harvey's employment with VSM Management, LLC was terminated. The decision to terminate Ms. Harvey's employment was reached by the management of VSM Management, LLC.

(ECF No. 37-7 at 3.)

error in the December Order in deciding that Plaintiff had failed to exhaust her retaliation claim. Accordingly, Plaintiff's Motion for Reconsideration is **GRANTED** on this exhaustion issue.

However, even with the foregoing finding of administrative exhaustion, the court is not persuaded that it committed clear error or manifest injustice in concluding that Plaintiff's prima facie case of retaliation fails. In her Motion, Plaintiff opines that there is a dispute of genuine fact based on an unsubstantiated assertion that Defendants' witnesses misrepresented their knowledge of Plaintiff's Charge to the court. (ECF No. 73 at 5–6.) Despite her arguments, Plaintiff's retaliation claim is unsustainable because (1) her complaint to the LLR about Dr. Choi's treatment of patients was not protected activity under Title VII; and (2) she cannot demonstrate a causal link between her protected activity of filing a Charge and the alleged retaliatory termination she suffered since the individuals responsible for her termination lacked knowledge of her protected activity. (ECF No. 67 at 12–14.) As a result of the foregoing, the court declines to reconsider its determination that Defendants are entitled to summary judgment on Plaintiff's claim for retaliation. Accordingly, the court **DENIES** Plaintiff's Motion for Reconsideration as to the sufficiency of her prima facie case of retaliation.

3. Public Policy Discharge

In the September Order, the court granted Defendants summary judgment on Plaintiff's claim for public policy discharge finding that her allegations of dental practice violations were not a "specifically recognized scenario[] where the public policy discharge exception might be applicable." (ECF No. 53 at 17 (citing Donevant v. Town of Surfside Beach, 778 S.E.2d 320, 326–27 (S.C. Ct. App. 2015)).) In the instant Motion, Plaintiff argues that she demonstrates a "clear mandate of public policy" in her citation to statutory authority governing the practice of dentistry. (ECF No. 73 at 6 (citations omitted).) Plaintiff further argues that if the court does not

agree to reconsider, the court should "at least certify the question to the South Carolina Supreme Court since this is a matter of South Carolina State Law and would otherwise deprive the Plaintiff of her day in court." (Id.)

After considering the entirety of Plaintiff's assertions, statements of error and/or manifest injustice, the court finds that reconsideration of the September Order's public policy discharge finding is not appropriate. The denial of reconsideration is appropriate because the court had already considered in the September Order and rejected Plaintiff's arguments regarding dental practice violations that were the same as or similar to the allegations found in the Complaint. (ECF No. 53 at 17 (citing ECF No. 1 at 6).) As a result, the court concludes that its entry of the September Order did not result in the commission of either clear error or manifest injustice. Consulting Eng'rs, Inc. v. Geometric Software Solutions & Structure Works LLC, 2007 WL 2021901, at *2 (D.S.C. July 6, 2007) ("A party's mere disagreement with the court's ruling does not warrant a Rule 59(e) motion, and such motion should not be used to rehash arguments previously presented or to submit evidence which should have been previously submitted."). Accordingly, the court denies Plaintiff's Motion for Reconsideration on the issue of public policy discharge.

III. CONCLUSION

For the foregoing reasons, the court **GRANTS IN SMALL PART AND DENIES IN LARGE PART** Plaintiff's Motion for Reconsideration (ECF No. 73) of the Orders entered on September 28, 2016 (ECF No. 53), and December 28, 2016 (ECF No. 67). After considering Plaintiff's Motion for Reconsideration, the court finds that Defendants are hereby entitled to summary judgment on Plaintiff's claims for race discrimination, hostile work environment, retaliation, public policy discharge and defamation.

IT IS SO ORDERED.

United States District Judge

July 18, 2017
Columbia, South Carolina